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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91237315
Party	Plaintiff American Marriage Ministries
Correspondence Address	NANCY V STEPHENS FOSTER PEPPER PLLC 1111 3RD AVENUE, SUITE 3000 SEATTLE, WA 98101 UNITED STATES nancy.stephens@foster.com 206-447-4400
Submission	Reply in Support of Motion
Filer's Name	Nancy V. Stephens
Filer's email	nancy.stephens@foster.com
Signature	/Nancy V. Stephens/
Date	11/19/2019
Attachments	Opposers Reply in Support.pdf(43463 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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AMERICAN MARRIAGE MINISTRIES, Opposer, v. UNIVERSAL LIFE CHURCH MONASTERY STOREHOUSE, INC. Applicant.	)	Opposition No. 91237315 **OPPOSER'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

The many red herring arguments raised by Applicant in its opposition brief do not overcome the cardinal problem with Applicant's case: that Applicant seeks to register "GET ORDAINED" for the service of enabling people to *get ordained.* No reasonable trier of fact, looking at the evidence before the Board, could conclude that the term "get ordained" is adequately distinctive for Applicant's claimed services to merit trademark protection.

II. ARGUMENT

A. Genericness Or Mere Descriptiveness As To *Any* Of Class 45 Warrants Summary Judgment In Favor Of Opposer As To That Class.

AMM moved for *partial* summary judgment. Thus, contrary to Applicant's assertions, *see* Opp. Br. 1, 11, the fact that AMM's opening brief did not address Class 35 is irrelevant to the merits of its motion regarding registrability of the applied-for mark for services in Class 45.

As to Class 45, it is a "well settled legal principle" that where a mark is generic or merely descriptive of one or more of the goods or services identified in a particular class, registration must be refused for that class in its entirety. *In re Analog Devices Inc.*, 6 U.S.P.Q.2d 1808 (TTAB 1988). Thus, so long as "get ordained" is generic or merely descriptive of *one* of the services in Class 45 – e.g., the claimed service of "ordaining ministers to perform religious

ceremonies" – registration must be refused for Class 45 *in its entirety*. The Board should reject Applicant's attempt to rewrite law to require otherwise. *See* Opp. Br. at 11.

The Board should also reject Applicant's assertion that AMM "does not identify the relevant class of services" which it claims to be generic or merely descriptive. *See* Opp. Br. at 12-13, 15. AMM's motion repeatedly identifies the service for which the mark is generic or merely descriptive: the service of enabling people to get ordained, identified in Applicant's certificate of registration as "ordaining ministers to perform religious ceremonies." *See* Motion at 1, 2, 4, 5, 6, 7, 8. Indeed, Applicant's claim is contradicted by Applicant's own extensive (albeit misguided) arguments that AMM's motion addresses only particular classes or services and not all claimed classes or services. *E.g.*, Opp. Br. at 11 (stating: "AMM limits its argument and evidence to the use of the GET ORDAINED mark in relation to 'ecclesiastical services, namely, ordaining ministers to perform religious ceremonies'"). AMM's motion properly focused its genericness inquiry on the description of services set forth in the certificate of registration. *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 640 (Fed. Cir. 1991). The Board should thus dismiss Applicant's argument that AMM failed to satisfy prong one of the genericness inquiry.

B. Opposer's Evidence Of Genericness Or Mere Descriptiveness Is Strong And Admissible.

Applicant spends much of its brief attempting to exclude evidence, presumably because Applicant knows that the actual content of the documents (which Applicant largely ignores) proves AMM's argument. Despite Applicant's objections and argument, the documents show that AMM satisfied prong two of the genericness inquiry, thereby demonstrating that the term "get ordained" is generic. Alternatively, AMM demonstrated that the term is merely descriptive, and is unprotectable because it lacks distinctiveness and fails to identify Applicant as its source.

1. AMM's Motion is Supported by Admissible Evidence

Applicant raises three concerns about the documents submitted as Exhibit F to the Declaration of Nancy Stephens. Each of these concerns is incorrect or cured below.

First, Applicant objects that certain documents are incomplete. Under FRE 106, AMM may supplement the record with complete copies of the writings if Applicant requests the introduction of complete copies. Applicant never requested complete copies of these documents prior to its opposition to AMM's summary judgment motion, and AMM now provides complete copies of the publicly visible written content of the webpages in question as Exhibits 3-9 and 15 to the Declaration of Dylan Wall. Nothing in the complete copies of these webpages changes the interpretation of the relevant excerpts of the websites that were submitted with AMM's original motion. Each of these webpages shows generic or merely descriptive use of the term "get ordained" to refer to ordination services provided by organizations besides Applicant.

Second, Applicant objects that certain pages are illegible. While AMM is uncertain which portions of these documents Applicant finds unreadable, as AMM and its counsel can read the documents, new copies are attached to the Wall Declaration as Exhibits 8, 12a, 12b, and 14.

Third, Applicant objects to the authenticity of certain documents, which fall into two categories: (1) screenshots of webpages and (2) an email. As for the webpages, Applicant misrepresents the evidence about the authenticity of these documents. Although AMM's 30(b)(6) witness was unable to recall in minute detail at deposition when each screenshot was taken and by whom, he did testify that four AMM employees collaborated to collect these screenshots in response to one of Applicant's discovery requests. Wall Dec., Exh. 18 at 177-180.[1] He further explained that he himself reviewed each of the screenshots and prepared a spreadsheet

[1] Though Applicant's brief asserts that these pages were attached to the Matesky Declaration, the pages appear to have been omitted. Copies of these pages are attached to the Wall Declaration.

documenting the source, including URL, of each screenshot, which was provided in response to Applicant's discovery requests. *Id.*; Wall Dec. at ¶ 19. Authentication is satisfied by evidence "sufficient to support a finding that the item is what the proponent claims it is." FRE 901(a). Here, Mr. Wall's testimony that he reviewed the screenshots produced in discovery and that he prepared the spreadsheet identifying the sources of the screenshots provides sufficient basis to support a finding that the screenshots are in fact accurate depictions of those webpages as they existed at a certain point in time. Applicant proposes no reason to believe otherwise. Nevertheless, AMM now submits additional testimony from Mr. Wall re-authenticating each document. FRE 901(b)(1); Wall Dec. at ¶¶ 2-19.

As for the email, Applicant's opposition brief simultaneously objects to and concedes the document's authenticity. Opp. Br. at 5-6 (citing AMM0001 and describing the document as an "internal ULC Monastery email[]"). Applicant's own assertion that the document is Applicant's document supplies sufficient evidence to allow the trier of fact – the Board – to consider the document. *See Alexian Bros. Health Providers Ass'n v. Humana Health Plan, Inc.*, 608 F. Supp. 2d 1018, 1022 (N.D. Ill. 2009) ("Rule 901 does not erect a particularly high hurdle"); *Kohler Co. v. Baldwin Hardware Corp.*, 82 U.S.P.Q.2D (BNA) 1100, 1104 (TTAB Jan. 11, 2007) (denying motion to strike documents based on authenticity objection where movant effectively conceded the authenticity of the documents elsewhere). Nevertheless, AMM now submits additional testimony from Mr. Wall to re-authenticate the document. Wall Dec. at ¶ 3.

Authenticity aside, Applicant's improper, unfounded, and defamatory objection regarding AMM's possession of the email does not provide any proper basis for exclusion.[2] Reliance on

[2] There is no evidence that Applicant has or had any policy regarding retention or deletion of emails sent or received by its employees, and Applicant identifies no legal duty to this effect. Applicant misrepresents Mr. Wall's testimony on this point; Mr. Wall testified that he received

this document is hardly improper; the document is plainly relevant, as it shows Applicant's own awareness of third-party uses of the phrase "get ordained" as a generic search term. Even if AMM improperly had this document (which is not true), Applicant would need to explain why it did not produce the document itself in response to AMM's discovery requests, which sought, *inter alia*, "All Documents in the possession, custody or control of Applicant which refer or relate to the use by persons or entities other than Opposer or Applicant of GET ORDAINED." Applicant provides no explanation for its withholding of this responsive, unprivileged document.

Applicant provides no valid reason or legal support as to why any of this evidence should be excluded. The Board should rely on the evidence submitted by AMM and reject Applicant's improper efforts to avoid the merits of this issue.

2. AMM Offered Strong Evidence of Genericness

"The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987 (Fed. Cir. 1986). The genus of services at issue is determined by Applicant's chosen recitation of services in the certificate of registration: in this case, "Ecclesiastical services, namely, ordaining ministers to perform religious ceremonies." The relevant public consists of members of the general public who are actual or potential users of such services. *Magic Wand, Inc.*, 940 F.2d at 641. That the term may have other meanings in other contexts does not diminish the fact that the term is clearly understood *by the relevant public* to refer to the generic act of being ordained to

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no instructions about what he could or could not do with emails he received in the course of his employment with Applicant; he was not prohibited from retaining the documents after his employment ended. Wall Dec., Exh. 18 at 54-56, 60. Mr. Wall also testified that he has not accessed any ULC emails for purposes of using those emails for AMM business and has not shared the emails with anyone outside of the context of discovery for this case. *Id.* at 154, 190-191. Applicant's accusation of a breach of loyalty is therefore wholly unfounded (not to mention long barred by the statute of limitations).

perform religious ceremonies. *See id.* at 640; *Remington Prods. Inc. v. North Am. Philips Corp.*, 892 F.2d 1576 (Fed. Cir. 1990) (assessing descriptiveness and genericness by looking at how a consumer would perceive the mark "in connection with the products").

AMM presented numerous examples of generic use of the term "get ordained" by members of the relevant public and by organizations that provide ordination services, including the following (underlining added):

- A Washington Post article with a quote from a man about to be ordained through the Catholic Church, saying: "Here I am, about to get ordained, with my brothers. This is the most important event in my life." (AMM369-370; Wall Dec., Exh. 2);

- A blog post from a man who describes himself as follows: "I'm Haydon, just pushing 30, recently married to the wonderful Jo, just moved house, just about to get ordained as a deacon in the Church of England." (AMM371; Wall Dec., Exh. 3);

- An online post about fashion for ministers which includes a question from a reader with the following: "I'm about to get ordained (God willing) as a deacon in the – Church, and am in the throes of purchasing my first clergy shirt and collars, among other things." (AMM373; Wall Dec., Exh. 5);

- An online post on the wedding planning website The Knot, in which the following question is asked and (excerpted) answer is given: "Q: How can we get our friend ordained so he can officiate?" "A: . . . [Y]our friend will want to get ordained online or at the local county clerk's office, which is often a quick and simple process." (AMM374; Wall Dec., Exh. 6a);

- The homepage for "The Church of the Latter-Day Dude", which states: "First, you might want to Get ordained as a Dudeist priest. There are over 450,000 worldwide." (AMM770; Wall Dec., Exh. 11); and

- The homepage for the Esoteric Theological Seminary, which offers: "Get ordained to perform a marriage / wedding – we do all the legal paperwork." (AMM 775; Wall Dec., Exh. 15).

See also Stephens Dec., Exh. F; Wall Dec., Exhs. 1-17. Contrary to Applicant's assertions, *see* Opp. Br. at 18, these examples relate exactly to the service of making people "ordain[ed as a] minister[] to perform religious ceremonies." These examples demonstrate that the relevant public understands the term "get ordained" as referring, generically, to the recited service of "ordaining

ministers to perform religious ceremonies."

3. If Not Generic, "Get Ordained" Is Merely Descriptive and Is Not a Source-Identifier.

Even if the term "get ordained" is not found to be generic for the services of getting ordained, it is at least merely descriptive, conveying an immediate idea of a function, purpose, or use of the services. *See In re Stereotaxis, Inc.*, 429 F.3d 1039, 1041 (Fed. Cir. 2005). Here, one of the key purposes of obtaining Applicant's services is to *get ordained* by an organization that provides ordination services, because once an individual becomes ordained, he or she is qualified to perform religious or quasi-religious ceremonies such as marriages. The term "get ordained" immediately conjures that purpose, as is illustrated by the many examples provided by AMM. Indeed, the term is part of the common lexicon for describing the action of becoming ordained as a minister through an organization that ordains ministers.

Significantly, the term "get ordained" does not serve any source-identifying function. Accordingly, it is not a protectable term. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768-69 (1992) (marks that do not inherently identify a particular source cannot be protected). Contrary to Applicant's assertions, *see* Opp. Br. at 18, the evidence shows that the term is used regularly to identify ordination services provided by parties other than the parties to this proceeding; in the above-quoted examples, the term is used in reference to the ordination services of the Catholic Church, the Church of England, the Church of the Latter-Day Dude, and the Esoteric Theological Seminary. Applicant supplied no evidence showing that the term "get ordained" identifies any particular source, much less that it identifies Applicant to any greater degree than it identifies other organizations that provide ordination services.

Applicant suggests that the term "get ordained" is inherently distinctive, as the Examining Attorney approved registration of the term without requiring Section 2(f) evidence.

See Opp. Br. at 3, 16. However, the Examining Attorney's determination is not binding on the Board and has no preclusive or precedential value. *Super Bakery, Inc. v. Ward E. Benedict*, 96 U.S.P.Q.2d 1134 (TTAB 2010); *Kelly Coyne, Erik Knutzen, & Process Media, Inc.*, No. CANCELLATION 9205383, 2017 WL 1476299, at *13 (Mar. 22, 2017). For the reasons explained above, the term "get ordained" cannot be inherently distinctive because it is incapable of identifying a particular source of ordination services.

Applicant's examples of registered marks including "get __" also fail to demonstrate that the term "get ordained" is distinctive—whether inherently or otherwise.[3] *See* Opp. Br. at 3-5. Indeed, for each of the examples of registered marks including the word "get" that Applicant provides, there are at least as many examples of unsuccessful attempts to register such terms. A quick search in the Trademark Electronic Search System shows that less than a third of attempted registrations of terms including the word "get" were successful (with 5656 live marks including "get" and 12013 dead marks including "get"). *See Cross Commerce Media, Inc. v. Collective, Inc.*, 841 F.3d 155, 166 (2d Cir. 2016) (observing that the PTO has required disclaimer of the word "collective" because it is descriptive, or rejected applications for the same reason, approximately 35% of the time, making it "far from clear" that the PTO routinely classifies the word as descriptive). Plainly, use of the word "get" in combination with another component does not suffice to make a phrase distinctive. Besides, the issue here is whether Applicant's specific use is distinctive, not whether terms including the word "get" should or can be distinctive in other cases. Yet Applicant notably does not say how, based on the evidence in this case, its use of this particular phrase in this context is distinctive.

In light of the many examples provided by AMM of uses of the term "get ordained" to

[3] Applicant supplies no evidence for its claim that PTO registers "GET ___" marks regularly without requiring a showing of secondary meaning. *See* Opp. Br. 19.

refer to the provision of ordination services, and the act of obtaining ordination services, from organizations other than Applicant, as well as the lack of evidence provided by Applicant regarding distinctiveness of the term's use, there can be no genuine dispute of material fact about the descriptiveness of the term. The term, as used and understood by the relevant public, refers to the generic service of ordaining ministers, not to Applicant's particular offering of such service.

C. Applicant Never Asserted Secondary Meaning In Its Answer, And Opposer Objects To Applicant's Improper Attempt To Amend Its Answer In Its Opposition Brief.

Applicant observes that "[t]he party moving for summary judgment has the initial burden to establish the absence of a genuine issue of material fact as to whether the applied-for mark has acquired secondary meaning as a trademark." Opp. Br. at 19. While this is true where the applicant actually raised the issue of secondary meaning, it cannot be true where an applicant does not claim secondary meaning as a basis for achieving distinctiveness.

Applicant never, until now, argued that the applied-for mark acquired secondary meaning. Its argument in its opposition brief is an improper and untimely attempt to amend its Answer and Affirmative Defenses. *See* FRCP 15(a). Applicant did not seek AMM's consent to amend its Answer, nor has it sought the Board's leave to do so, as required by the Federal Rules. If Applicant had raised this issue in its Answer, or even during discovery, AMM would have collected evidence on it during discovery and would have raised the issue in its summary judgment motion. AMM objects to Applicant's improper and untimely attempt to amend its Answer to raise secondary meaning for the first time in this briefing on summary judgment, and moves the Board to disregard Applicant's briefing about secondary meaning.

Yet even if the Board considers secondary meaning, the evidence supplied by AMM in support of its motion shows such a proliferation of use of the term "get ordained" in the context of ordination services that secondary meaning could not attach to any of the users of the term, as

the term does not identify the services of any one provider of such services. There is also an utter lack of evidence in the record that anyone who uses or encounters the term recognizes Applicant as the source of the term. While Applicant reports that it has ordained many individuals since 2014, *see* Goschie Dec. at ¶ 13, there is no evidence that any of the ordained individuals saw or knew of Applicant's use of the term, or understood the term to refer specifically to Applicant as the source. Nor is there any evidence of how Applicant's number of ordinations compares to that of other providers. Indeed, evidence supplied by AMM suggests that this number is not significant; the Church of the Latter-Day Dude, which also uses the term "get ordained," reports having ordained "over 450,000" individuals as Dudeist priests, more than Applicant. *See* Wall Dec., Exh. 11; Goschie Dec. ¶ 13. Further, though Applicant apparently used the term "get ordained" for nine years, it is far from the exclusive user of the term in the context of providing ordination services; AMM supplied numerous examples of other providers of ordination services who used the term in connection with their own services during that time. *See* Stephens Dec., Exh. F; Wall Dec., Exhs. 2-17.

III. CONCLUSION

There can be no genuine dispute that the term "get ordained" is understood and used by the relevant public to refer to the generic act of becoming ordained as a minister or the generic service of enabling others to become ordained as ministers to perform religious ceremonies. Applicant presents no persuasive evidence to support a conclusion that the term specifically identifies its services over the services offered by other organizations who ordain ministers. Accordingly, the term is generic, or at most, merely descriptive, and it is not eligible for registration or protection as a trademark.

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/Nancy V. Stephens/
Nancy V. Stephens WSBA No. 31510
Benjamin J. Hodges WSBA No. 49301
Kelly A. Mennemeier WSBA No. 51838
Foster Garvey PC
Attorneys for Opposer
1111 Third Avenue, Suite 3200
Seattle, WA 98101-3299
206-447-4400

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2019, I served the foregoing Opposer's Reply in Support of its Partial Motion for Summary Judgment on the Applicant by emailing to Applicant as follows:

Michael P. Matesky, II
Matesky Law PLLC
trademarks@mateskylaw.com
mike@mateskylaw.com

/Nancy V. Stephens/
Nancy V. Stephens